BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SUSAN COOK	)	
Claimant	)	
VS.	)	
	)	Docket No. 165,691
ASHLAND FEEDERS	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The application of claimant for review by the Workers Compensation Appeals Board of the Decision of Administrative Law Judge Kenneth S. Johnson, dated November 24, 1997, came on for consideration.

APPEARANCES

Claimant appeared by and through her attorney, Steve Brooks of Liberal, Kansas. Respondent and its insurance company appeared by and through their attorney, B. G. Larson of Dodge City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Decision of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's disability? The parties have stipulated to a 9 percent whole body functional impairment with the only issue being work disability.

FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) It has been stipulated that claimant suffered accidental injury arising out of and in the course of her employment on November 5, 1991. At that time, claimant, a feed truck driver working for respondent, slipped on icy steps and fell, injuring her low back. Claimant received conservative treatment through Dr. Ely Bartal who returned the claimant to work with permanent restrictions of no lifting over 75 pounds and no repetitive bending or lifting. The May 24, 1993, restriction sheet from Dr. Bartal indicated claimant was to avoid excessive bending or twisting. However, the office note of May 24 specifies "no repetition of bending and lifting." Dr. Bartal went on to assess claimant a 3 percent whole body functional impairment.

(2) Claimant was examined at her attorney's request by Dr. Philip R. Mills. Dr. Mills found claimant to have suffered a compression fracture at L3 resulting in minor abnormalities and ongoing periodic pain. He assessed claimant a 15 percent functional impairment to the body as a whole and restricted her from bending and prolonged walking, and advised against lifting greater than 25 pounds.

(3) Claimant was referred to Doug Lindahl, a vocational rehabilitation expert, for a vocational evaluation. Mr. Lindahl felt, based upon the restrictions of Dr. Mills, that claimant had suffered a 77.9 percent loss of access to the open labor market. Based upon the restrictions of Dr. Bartal, he felt claimant had suffered a 22.4 percent loss of access to the open labor market. In considering claimant's ability to earn a comparable wage he felt, based upon the restrictions of Dr. Mills, that claimant had suffered a reduction of 56.1 percent when considering the local market of Southwest Kansas and a 32.7 percent reduction when considering the entire state of Kansas. Based upon the limitations of Dr. Bartal, Mr. Lindahl felt claimant had suffered a 32.7 percent loss when considering the local market and a zero percent loss when considering the state market.

(4) After being released from medical treatment, claimant was offered three different jobs with respondent. The first involved painting fences which would require that claimant repetitively bend down to the ground. The fence included a five foot high rail, a three foot six inch rub rail, and the posts which were planted in the ground. Respondent's representative, David Freelove, the manager of Ashland Feeders, acknowledged this painting job involved prolonged walking and would require that claimant bend repetitively.

(5) Claimant was also offered a position cleaning water tanks. This would have obligated claimant to remove a drain plug and clean the sides of a tank 2-1/2 foot tall with a two foot long scrub brush. Mr. Freelove acknowledged that the tank cleaning job would require claimant to repetitively bend and stoop.

(6) Claimant was also offered an office assistant job which would allow claimant to work for four to eight hours per day answering phones, weighing trucks, filing and performing

miscellaneous duties. While claimant could physically perform the duties of this job it was not clear from Mr. Freelove's testimony whether this involved a full-time or part-time position. The job would pay between $5.75 and $7 per hour and 40 hours per week would be the maximum available in this position.

(7) Claimant did not accept the positions offered by respondent but instead married and moved with her husband to Oklahoma. While in Oklahoma, claimant has held several positions including working in other feed lots at $5.75 to $7 per hour, working as a well pumper at $1300 per month and working as a secretary in her new husband's company at $800 per month.

(8) Respondent contends claimant should be denied work disability as a result of her refusal to attempt the jobs offered. Respondent further contends claimant's credibility is tarnished as she was paid temporary total disability compensation concurrently by two companies, CIGNA and Travelers for over 21 weeks. Claimant acknowledged at the regular hearing that she received the dual checks and explained that she had contacted the respondent when she first started receiving the dual checks and advised them of the dual payments. She was advised by Cindy Feldt, the respondent's office manager, that "we just have good insurance." This explanation by claimant is uncontradicted.

The Administrative Law Judge awarded claimant the 9 percent whole body functional impairment as stipulated to by the parties, finding that respondent had offered claimant accommodated work within the medical restrictions and that claimant had failed to respond to respondent's offer of a job. The Administrative Law Judge found, in addition, that claimant had worked for at least two additional employers for $7 per hour or more and had failed to overcome the presumption in K.S.A. 44-510e(a).

CONCLUSIONS OF LAW

In workers compensation litigation the burden of proof is upon claimant to establish the claimant's right to an award of compensation by proving the various conditions upon which her right depends. This must be established by a preponderance of the credible evidence. K.S.A. 1991 Supp. 44-501 and K.S.A. 1991 Supp. 44-508(g).

K.S.A. 1991 Supp. 44-510e states in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Respondent argues that once an employer makes a good faith offer of employment which pays a comparable wage, claimant must attempt to perform that work unless there is reasonable justification to do otherwise. While respondent does not specifically cite any case in support of this, the Appeals Board acknowledges two recent Court of Appeals cases that address this issue. In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the Court of Appeals declared that the Workers Compensation Act should not be construed to reward a worker for refusing a proffered job the worker has the ability to perform.

The Appeals Board, in considering the policies of Foulk, cannot find in this instance that claimant is in violation of those policies. Respondent offered claimant three separate jobs. Respondent's representative, Mr. Freelove, acknowledged two of the three jobs violated claimant's restrictions. The third job, which consisted of substantial office work was within claimant's restrictions, but Mr. Freelove could guarantee claimant at most 40 hours per week at $7.00 per hour which computes to $280 per week. When compared to the stipulated average weekly wage of $432.81, it is clear claimant would not be working at a comparable wage at this job. The Appeals Board therefore finds the policies of Foulk do not apply in this circumstance.

The Appeals Board must also consider the recent Court of Appeals decision in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals, in harmonizing the language of K.S.A. 44-510e(a) with the principles of Foulk, found that a fact finder must first decide whether a claimant has made a good faith effort to find appropriate employment. If a finding is made that a good faith effort has not been made to find appropriate employment, then the fact finder must determine an appropriate post injury wage based upon all of the evidence before it, including any expert testimony concerning claimant's capacity to earn wages. The Appeals Board has previously discussed the applicability of Copeland to injuries which occur pre-July 1, 1993. Copeland obligates the finder of facts to decide claimant's ability to earn wages. The language of K.S.A. 44-510e in effect before July 1, 1993, also obligates the finder of facts to determine the claimant's ability to earn comparable wages. Therefore, to apply Copeland to a pre-July 1, 1993, injury would simply be case law supporting an already existing statutory obligation.

After leaving respondent's employment claimant did obtain employment with several other employers. She worked in feed lots paying up to $7 per hour, pumping jobs paying $1300 per month and secretarial jobs paying $800 per month. In considering claimant's post-injury work history and applying K.S.A. 1991 Supp. 44-510e, the Appeals Board finds claimant has shown an ability to earn $1300 per month. This equates to an average weekly wage of $300 per week resulting in a wage loss of 31 percent when compared to claimant's stipulated average weekly wage of $432.81.

The opinion of Doug Lindahl regarding claimant's loss of access to the open labor market is uncontradicted. In considering Mr. Lindahl's analysis of the restrictions of Dr. Mills and Dr. Bartal, the Appeals Board finds claimant has suffered a loss of access to the open labor market of 50 percent.

In determining the extent of permanent partial disability, both claimant's reduction in ability to perform work in the open labor market and the ability to earn comparable wages must be considered. The Supreme Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990) found that, while a balancing of the two factors is required, the statute does not specifically state how this balance is to occur or what emphasis is to be placed on each of the tests. The Supreme Court in Hughes found that giving equal weight to the two factors is an acceptable method of computing work disability under K.S.A. 1991 Supp. 44-510e. Therefore, the Appeals Board in considering claimant's 50 percent loss of access to the open labor market with her 31 percent loss of ability to earn comparable wages, finds claimant has suffered a 40.5 percent permanent partial work disability pursuant to K.S.A. 1991 Supp. 44-510e.

The Appeals Board finds that the decision by the Administrative Law Judge to limit claimant to her functional impairment should be reversed, and the award modified to grant claimant a permanent partial work disability of 40.5 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Decision of Administrative Law Judge Kenneth S. Johnson, dated November 24, 1997, should be, and is hereby, modified and claimant Susan Cook is granted an award against the respondent Ashland Feeders and Travelers Insurance Company for an injury occurring on November 5, 1991, for a 40.5 percent permanent partial general body disability.

Claimant is entitled to 41 weeks temporary total disability compensation at the rate of $288.55 per week in the amount of $11,830.55 followed thereafter by 374 weeks permanent partial disability compensation at the rate $116.87 in the amount of $43,709.38 for a total award of $55,539.93. As of March 25, 1998, claimant is entitled to 41 weeks of temporary total disability compensation at the rate of $288.55 in the amount of $11,830.55 followed thereafter by 292.14 weeks permanent partial disability compensation at the rate of $116.87 in the amount of $34,142.40 for a total due and owing of $45,972.75 which is ordered paid in one lump sum minus amounts previously paid and minus the stipulated credit of $6,020.45 representing the overpayment of temporary total disability compensation. Thereinafter, claimant is entitled to 81.86 weeks permanent partial disability compensation at the rate of $116.87 per week in the amount of $9,566.98 until fully paid or until further order of the director.

Claimant's contract of employment with her attorney is approved insofar as it is not in contravention to K.S.A. 44-536.

Future medical treatment will be awarded upon proper application to and approval by the Director.

The fees and expenses necessary to defray the cost of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Underwood & Shane
Transcript of Proceedings $160.50

K. Pfannenstiel Reporting & Assoc.
Deposition of David Freelove Unknown

Owens, Brake, Conan & Associates
Deposition of Doug Lindahl $116.65

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steve Brooks, Liberal KS
B. G. Larson, Dodge City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director